doesn't protect our workers. Why do we want someone such as that to get a promotion?

Therefore, the Democrats have said to the President, through our voice in the Senate: Send us someone else and we will be delighted to work with you. We have worked with you 208 times, Mr. President, and 10 times we said no.

We said you are out of the mainstream, and the response of a 95-percent success record by the Republicans—and a few are not going along with it, and bless them for that—is: We will take away your right, Democrats, to stand up for the things you think are important. We will take away your rights by changing the rules in the middle of the game, by skirting a 67-vote requirement for changing the rules. We will do it.

There is politics being played. The majority leader talked about this in a speech in a political way, which was wrong. He has not agreed to a compromise. Senator REID has offered several. The fact is, people have to know what is at stake.

I hope everyone within the sound of my voice will know the reason why Democrats have stood so firmly against the nomination of Janice Rogers Brown. It is because we care about the people we represent, and we care about mainstream judges, and we do not want to see such a radical individual get this position and begin to whittle away at the rights our people have won, at the fairness our people have won.

This is very important. This vote is going to change the Senate forever. But more than that, it will impact the lives of the people. Changing the Senate, changing tradition, changing the role of the minority to make a difference, to be heard, freedom of speech—these are all important. But at the end of the day, it is about our kids, our grandkids, our seniors, our families, our workers, the air we breathe and the water we drink, and this is all connected to the judges. This is not disconnected. This is the brilliance of our Founders who said the judicial branch, the judges, shall make sure that everything we do in the legislative branch and in the executive branch is constitutional, is right, is reasoned.

If we have people on the bench who believe that anything we do disintegrates our family; that anything we do, such as the highway bill, for example, turns into an expropriation of property and the rapid rise of corruption and the loss of civility and the triumph of deceit—this belongs somewhere else, not in the courts.

Mr. President, I thank you for your patience. I thank my staff who has done an extraordinary job for me in analyzing these decisions. This is not easy to do because you have to go line by line. I know the Presiding Officer knows these cases can be very long and confusing. My staff are attorneys. They are also very smart attorneys, and they were able to get to the point of these cases and bring home this message to people that when we fight against 10 judges out of 218, it is for a reason. It is not because we want to be difficult. It is because we believe when the Constitution says the Senate has the right to advise and consent on judges, it does not mean when the President feels like it. It does not mean between the hours of 11 and 1 on Wednesday. It means every time he sends a nomination to us, he should have, in fact, sought the advice and consent of the Senate.

We have a big debate coming up tomorrow. I just wanted to give a little reality check so people understand for what we have been fighting.

I thank the Chair. I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. MARTINEZ). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. DURBIN. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DURBIN. I ask consent I be recognized as in morning business and be allowed to speak as long as necessary.

The PRESIDING OFFICER. Without objection, it is so ordered.

JUDICIAL FILIBUSTERS

Mr. DURBIN. Mr. President, 51 years ago today the Supreme Court, just across the street from the Senate Chamber, issued one of its most famous rulings in the history of the United States of America. The ruling was Brown v. Board of Education. It may have been one of the most courageous decisions ever issued by the Court. It rejected the cruel legal fiction of separate but equal and said that in the United States of America there would be no second-class citizens.

What an amazing victory for justice. But for some time, in some States, the Brown decision remained a victory on paper only. In much of the United States, in the Deep South, the Brown decision was met with massive resistance. Governors refused to obey the court ruling. Three years after that court decision, 48 years ago today, on May 17, 1957, 36,000 people gathered in Washington, DC, for the first march on Washington.

This is a photo of that march. We all know about the famous 1963 march, but the 1957 gathering was really the forerunner to that 1963 march. In those days, in 1957, it was known as a Prayer Pilgrimage for Freedom in Washington, DC.

Take a look at some of the people who gathered on that day 48 years ago. Dr. Martin Luther King, 29 years of age, was among those who gathered to speak. His leadership had been tested by the crucible of the Montgomery bus boycott. His remarks at the 1957 gathering were not nearly as well known as his immortal ''I Have a Dream'' speech in 1963, but they are powerful and worth repeating on this the 40th anniversary of the day he first delivered them. Here is how Dr. Martin Luther King opened his remarks on that day. He said:

> Three years ago the Supreme Court of this nation rendered in simple, eloquent, and unequivocal language a decision which will long be stenciled on the mental sheets of succeeding generations. For all men of goodwill, this May 17th decision came as a joyous daybreak to end the long night of human captivity. It came as a great beacon light of hope to millions of disinherited people throughout the world who had dared only to dream of freedom.

Dr. King went on to say:

> Unfortunately, this noble and sublime decision has not gone without opposition. This opposition has often risen to ominous proportions. Many states have risen up in open defiance. The legislative halls of the South ring loud with such words as 'interposition' and 'nullification.'
>
> But even more, all types of conniving methods are still being used to prevent Negroes from becoming registered voters. The denial of this sacred right—

Dr. King said—

> is a tragic betrayal of the highest mandates of our Democratic tradition.

But Dr. King did not stop with this sad commentary on what he saw in America. He delivered his prescription for progress when he said:

> And so our most urgent request to the president of the United States and every member of Congress is . . . Give us the ballot, and we will no longer have to worry the federal government about our basic rights.
>
> Give us the ballot and we will no longer plead to the federal government for passage of an anti-lynching law; we will by the power of our vote write the law on the statute books of the Southland bring an end to the dastardly acts of the hooded perpetrators of violence.
>
> Give us the ballot, and we will transform the salient misdeeds of bloodthirsty mobs into the calculated good deeds of orderly citizens.

What a speech. Not nearly as heralded as his speech a few years later, but certainly what Dr. King said that day still touches the hearts of every American who dreams of the ideals of this great Nation.

Now, 51 years later, it is hard to imagine the way Brown v. Board of Education was received. Most Americans look back with pride to the end of segregation in our public schools. We regard it as a great achievement that 182 years after our Nation was founded, a new generation of Americans had the courage and conscience to confront the bitter legacy of slavery, the challenge that our Founding Fathers could not resolve with all their wisdom. These people had the courage to confront segregation and voting discrimination.

Many Americans didn't support Brown v. Board of Education, not in 1954, not in 1967. That is why 36,000 people gathered on the Mall 38 years ago today. Many southern States flatly refused to obey the Brown decision. The same ruling that Martin Luther King praised as a joyous daybreak, others denounced as judicial activism. Judicial activism—that is what they said

about a decision to integrate America's schools. The courts had gone too far. Many argued: Leave it to the States to decide; this is not a decision to be made at the Federal level; certainly it is not a decision to be made in that Court across the street; those judges went too far, they argued in Brown v. Board of Education.

Does this sound familiar? That is exactly what we are hearing today. The words in opposition to Brown v. Board of Education echo through this Senate Chamber and the Halls of Congress even today.

Sadly, we may be on the verge of a constitutional confrontation over the Senate's constitutional advise and consent responsibilities regarding Federal judges. To listen to many on the far right, you would think it was events only in the last few years that have pushed us to the brink, but that is not the case.

Earl Warren of California was Chief Justice of the Supreme Court during the momentous Brown decision. The John Birch Society began putting up ''Impeach Earl Warren'' billboards in 1961. Later they tried to impeach William O. Douglas, one of the most outspoken and eloquent Justices on the Court. The far right tried to impeach Frank Johnson. Who is Frank Johnson? An interesting story.

Just a few years ago I joined JOHN LEWIS—he is a Congressman from Atlanta, GA, and what he does each year is invite Members of Congress, Democrats and Republicans, to come back down south and visit Montgomery and Birmingham and Selma. JOHN LEWIS is the perfect guide for these visits because JOHN LEWIS was there on that bridge in Selma, marching toward the capitol so that African-American people would have the right to vote. Because this young man had this idealism to participate in that march and the freedom rides, he had his skull cracked at the Selma bridge. It almost killed him.

I asked JOHN LEWIS, tell me about the Federal judge, Frank Johnson, that judge in Alabama.

He said: We wouldn't have had a civil rights movement, we certainly would not have had that parade, demonstration in Selma, without the courage of that man, Frank Johnson. Frank Johnson, a Republican appointee to the Federal bench, stood up and said: Yes, these Americans have the right to march and speak.

It was really unpopular. A lot of people hated Judge Johnson because of it. He was persona non grata in his whole community. His family was harassed. He did courageous things that permitted the Montgomery bus boycott and the freedom marches across Edmund Pettis Bridge. For that, the far right, who accused him of judicial activism, wanted him impeached. They didn't agree with his decision. They said he went too far.

Since 1961, 8 of the 12 Federal impeachments or near impeachments in Washington have involved our judges. The far right has been demanding that the Senate rein in what they call ''activist judges'' for decades. What is different now is what used to be extreme, discordant voices just heard in muted tones, now own great microphones in this democracy. They have called on their followers in Congress to follow their agenda.

Sadly, they have many allies in high places—allies in the Senate who are willing to break the rules of the Senate to change the rules of the Senate so that the far right can pack the Federal courts with judges more of their liking, judges who are not activist by their definition.

Today their allies in the Senate are willing to use the nuclear option to destroy the filibuster and to really destroy our system of checks and balances.

The obvious question is, in a body of 100 men and women where counting votes is the most important thing: Do they have enough allies? For the sake of our democracy, I pray they do not. We hope there will still be a majority of Senators who love this country, love this Constitution, and love this Senate enough to preserve the Federal courts as a fair and independent branch of Government. This should not be an exercise of power by the extreme part of any political party.

One of the men I respected most in the world, probably the man who is responsible for my standing here today more than any others, was a man named Paul Douglas, who was a Senator from Illinois from 1948 to 1966. I will never forget that day in February of 1966 when he agreed to hire me as a college student to work in his office across the street in what is now the Russell Senate Building. It was one of the most exciting things I had ever done, a student from Georgetown University from East St. Louis, IL, was going to work in the office of a Senator.

I would have done anything they asked me to do, and they asked me to do a lot of things. But the most exciting thing I did was each night Senator Douglas, who had been gravely wounded in World War II as a marine in the South Pacific, insisted on signing all letters. With one arm, he needed help, and that's where I came in. I would sit next to him on a chair next to the conference table with a big stack of letters Senator Douglas was sending back to Illinois, and as he signed them, I would pull each letter away. That was my job as an intern.

It was an exciting job. It sounds boring, I'm sure. But this man who had done so much with his life would sit there as he signed the letters and answer my questions, and I had plenty of them, and talk about his life and the things that he had done.

He talked about the 1948 Democratic Convention, when civil rights really became the focal point of a national debate, when he grabbed the standard of the Illinois delegation at that convention and paraded around the hall leading a demonstration in favor of a mayor from Minneapolis named Hubert Humphrey, who said that we had to come out of the shadow of States rights into the bright sunshine of human rights.

Paul Douglas was as committed to civil rights as any man I ever knew. He helped lead the fight in the Senate in the 1950s and much of the 1960s to pass much of that historic legislation. He ran smack dab into the filibuster, the filibuster that was used by some Senators, primarily from the South, to stop the civil rights legislation. It was almost unbreakable. It took 67 votes in that day to stop it. You remember the filibuster? That is the procedure in the Senate where any Senator can stand at the desk here and speak as long as their voice and bladder will allow, stand up there and argue for all the principles and values they believe in. You saw it, Jimmy Stewart, ''Mr. Smith Goes to Washington.'' It is still in the Senate books. It is still the rule. It has been here for over 200 years.

Some people say that is crazy. In this age of technology, why would we want this body to be dragged down by one Senator who wants to talk?

But that is what the Senate is all about. That is why we are different than the House of Representatives. I served over there with pride for 14 years. I love the House of Representatives. But they are a different institution, under our Constitution. If you have a large State with many people, you will have more Congressmen. We have quite a few people in Illinois, 12.5 million; 19 Congressmen. Think of all the Congressmen from California. But then come across the Rotunda, how many Senators from California? Two. How many from South Dakota? Two. How many from Illinois? Two. How many from Rhode Island? Two. Because the Founders of our Nation said we will have one branch of the legislature which represents the population of America, but the Senate is different.

The Senate will give every State a chance. The Senate will allow the smallest States the same number of votes as the largest States, and within the Senate we will recognize and respect the right of any Senator from any State, large or small, to engage in debate. We will protect that Senator's right, even if many people think that is not a wise position the Senator is taking, because we want to protect the rights of the minority. That is why the Senate is different.

So Paul Douglas, when he argued the civil rights bill, ran smack dab into the filibuster. One would think, as much as he hated segregation and as much as he hated Jim Crow laws, that Senator Douglas and many other progressives, Democrats and Republicans, would have tried to eliminate the filibuster which held up the civil rights bill. But they did not. Why? Because that procedure is critical to what this institution

is all about. Doing away with the filibuster does away with the protection of minority rights. It changes the dynamic.

What happens when we have a filibuster? In order to stop the filibuster, an extraordinary majority of the Senate must come forward. Now it is 60 votes. So if a Senator stands and says, this is unfair and unjust and I am going to speak at length to tell you why, what does it mean? Not only that he is a person of conviction, but it means to resolve that difference, to try to move on from the filibuster, people of good will have to meet and talk and come to an agreement. The filibuster forces compromise, the filibuster forces bipartisanship, which the Senate is all about.

That is what has happened over the years. Those who were engaged in the civil rights debates played by the rules and sometimes lost by those same rules, but they won in time. Four months after the prayer pilgrimage that I mentioned in 1957, 4 months after 36,000 people gathered at the Lincoln Memorial to protest what they considered the slow progress in America to deal with segregation, 4 years after that day, Congress passed the 1957 Civil Rights Act, the first Federal Civil Rights Act since the days after the Civil War. After that came a 1960 voting rights bill, the landmark Civil Rights Act of 1964, the Voting Rights Act of 1965.

Those advances were not won by impatient Senators breaking the rules. They were won by courageous Americans who persevered, who marched on Washington, who marched on Selma, AL, who dared to register and vote when that basic act of citizenry could cost you your life.

Near the end of his speech 48 years ago today, Martin Luther King told the thousands of people gathered at the prayer pilgrimage at the Lincoln Memorial:

> We must work passionately and unrelentingly for the goal of freedom but we must be sure that our hands are clean in the struggle.

What Dr. Martin Luther King was saying in the dark hours of Brown v. Board of Education, when it appeared there was little chance that the Congress would respond, ''your hands must be clean in the struggle.''

That, my friends, is the debate we will face when it comes to changing the Senate rules. It isn't just a matter of achieving our goals; it is how we achieve our goals. The ends do not justify the means. Think of it: Dr. King, at the age of 29, having lived through the rank discrimination that was prevalent in many parts of America, still reminded those who were listening, play by the rules, keep your hands clean in the struggle. What he was telling us was that no matter how passionately we believe something, we are not entitled to rig the rules to achieve the outcome we want. That is not how it works in society. It is not how it works in families. It certainly is not how it works when you follow the rule of law.

There always will be some who reject court decisions they do not agree with as ''judicial activism.'' There will always be some who want to restrict the independence of judges and put their own stamp on the judiciary. There will always be impatient people who want to rig and change the rules or short circuit the rules of democracy. As Senators, we have taken an oath to defend our Constitution. It is our sacred responsibility to tell them no.

This is not the first time in our Nation's history that a President of the United States wants more power. It is a natural thing in government, and the Founding Fathers who wrote this Constitution understood it. They knew that if there was no check on the judiciary, judges would be too powerful. They knew if there was no check on the Congress, the Congress would take too much power. And they certainly knew that an Executive like a President would always want to increase his power over the people. That is what led them so many times to create the checks and balances which have resulted in what we enjoy—the longest lived democracy in the history of the world.

President Thomas Jefferson, 16 years after the Constitution was written creating an independent judiciary, Thomas Jefferson, the man who wrote the Bill of Rights, was reelected as President of the United States in 1805, said to the Senate, which met on the first floor of this building not far from where we gather, said to the Senate: You are a majority of my party. You know that Supreme Court—which is in the same building—is a court which has ruled against us and sees the world quite differently. Thomas Jefferson said to the Senate: Join me in impeaching Samuel Chase. Take this Justice off the Supreme Court and let all of these judges know if they do not see the world in the terms that we believe it should be in, they will be removed from office.

Understandably, Jefferson was frustrated by the judges who were not listening to him and following his beliefs. So he came to his party in the Senate and said: Join me. And they said: No, Mr. JEFFERSON. We are loyal to you and your party, but we are more loyal to the Constitution, and the Constitution insists the judiciary must be fair and independent and balanced. And they said no.

In more recent times, many can recall that Franklin Delano Roosevelt, one of our greatest Presidents, reelected to a second term, frustrated by the Supreme Court across the street which had killed his New Deal legislation, said: It is time to do something about the old men on the Court. He came to this Chamber, this Senate, and said to the Democrats of his own party: Help me change the judiciary. We need to put more Justices on the Supreme Court to overcome those old men. The Democrats and Republicans in the Senate said: No, Mr. President. We respect you. We support your goals and your programs. But the Constitution is more important than increasing your power as a President over the judiciary.

And here we are today in the year 2005, coincidentally at the beginning of President George W. Bush's second term. And what do we hear from this President? He comes to this Chamber, to the Senate, and says to Democrats and Republicans alike: I want more power over the judiciary. I want to do something about those activist judges. And I resent the fact the Senate has not approved every judicial nominee which I have sent for approval.

Which takes me to my last chart. For those following debate, for those who want to know what the score is, it is 208 to 5 or maybe 208 to 10, depending on your count. But more than 95 percent of the nominees sent by President Bush to the Senate Chamber for approval have been approved. Mr. President, 208 to 5, and we are facing a constitutional crisis and confrontation because this President cannot get 5 judicial candidates he insists on?

One wonders if this President, coming to this Senate, would hear the echos of what Thomas Jefferson heard or Franklin Roosevelt heard where his own political party would stand up and say: Mr. President, we respect you, but we respect the Constitution more. We respect the Senate more. Sadly, few of those voices have been raised.

Within a matter of hours or days, we will face this historic constitutional crisis. I believe it comes down to some very fundamental principles. Neither this President nor any President should be allowed to change the rules in the middle of the game, to take away the right of extended debate on judicial nominees. Neither this President nor any President should be allowed to change the checks and balances which have given us our lifeblood as a nation for over 200 years. Neither this President nor any President should make a lifetime appointment of someone to a Federal court who is not prepared to take on that awesome task and to dispatch it with the kind of integrity and skill and commitment to the values of America we must insist on.

So in a short period of time, there will be a test in this Senate the likes of which it has never seen. We almost have to go back to the Civil War to recall a debate of this proportion. I sincerely hope my colleagues will rise to this challenge. I sincerely hope they will understand there is more at stake than whether a President has a good press release one day, whether some supporters cheer them on for standing up for 5 or 10 nominees, who understand that what we are debating is, sadly, going to be viewed for generations as a test of whether we are truly committed to preserving and defending the Constitution of the United States.

I still have great hope. I still have great hope that enough Republican

Senators will stand up to this President as Thomas Jefferson's party stood up to him, as Franklin Roosevelt's party stood up to him and said: Mr. President, we respect you, we believe in your program, we will support you, but first we have to be guided by our Constitution, and we cannot increase your power in this Government at the expense of the balance that was created by the wisdom of our Founding Fathers.

I yield the floor.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I ask unanimous consent to speak such time as I may require.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. FEINGOLD. Mr. President, I further ask that following my remarks, the Senator from Louisiana be recognized for her remarks.

The PRESIDING OFFICER (Mr. ALEXANDER). Without objection, it is so ordered.

Mr. FEINGOLD. Mr. President, it is not uncommon for Senators to stand in the Senate and tell their colleagues and the American people that an upcoming vote is one of the most important the Senate will ever take. We are the masters of hyperbole in this body, forever standing on the precipices and poised on the brink of momentous decisions.

But today, I think most will agree with me: We truly are at such a moment. The Senate is on the verge of making a decision with potentially enormous consequences for this institution and for the country and the people we serve. At stake is not just the fate of a handful of judicial nominations or of a future Supreme Court nomination, as important as they may be. No, the decisions made this week will resonate far beyond this Chamber and far beyond the current controversy.

I will speak today about how we arrived at this moment of great peril and how we might step back from the brink. I will speak about the consequences of the question that will apparently be put before the Senate prior to our next recess. I will speak today about principle and about power.

While they do not always attract a lot of public attention, traditional nominations are very important. We all know that. The judicial branch is a coequal branch of Government. The interpretation and enforcement of the laws we pass in Congress depend greatly on the men and women who serve as judges, and, of course, Federal judges serve lifetime appointments. Decisions made by the President and the Senate on judicial nominations have a long-term and long-lasting impact on the Nation.

Disputes over how the Senate should exercise its constitutional power of advice and consent on such nominations are as old as the Republic itself. Nominations have led to some of the most historic and divisive debates in this body, dating back to efforts to pack the courts with Federalist judges in the waning days of John Adams' Presidency. More recently, we had debates about Franklin Delano Roosevelt's court-packing plan in the late 1930s, the Abe Fortas nomination in the late 1960s, and Robert Bork in the late 1980s, to give a few examples.

Debate, even bitter partisan debate, over judicial nominations is nothing new. What is new is that the Senate is now poised to break with its rules and traditions. For the first time, the desire of one side to win nomination battles has become so intense and so unyielding that it threatens the very rules by which this Senate has operated for centuries.

In all of the previous controversies I have mentioned, which I think most serious students of Congress and the courts would agree were more significant than the current debate over a handful of circuit court judges, the rules of the Senate have allowed the battles to be fought fairly.

Only today, apparently, must those rules give way so one side can have its way. The majority leader and those who support his extraordinary plan to change the Senate rules by fiat seek to cloak their grab for power in the source of our Nation's loftiest principles, and that source is the Constitution.

This is not just a silly public relations effort to change the name of their plan from the nuclear option—the term coined by the majority leader's predecessor—because that term obviously fares rather poorly in the public opinion polls. It is actually a cynical effort to distract the public from the extraconstitutional nature of the plan by invoking the Constitution itself.

In the last Congress, as in this one, I served as the ranking member of the Senate Subcommittee on the Constitution. The subcommittee held a hearing in May 2003 with the grandiose title: ''Judicial Nominations, Filibusters, and the Constitution, When a Majority is Denied Its Right to Consent.'' The hearing was certainly interesting and provocative. I was there the whole time. No one made a convincing case that there is any such right in the Constitution anywhere.

Article II, section 2 spells out the Senate's role in nominations. It states, in relevant part, that the President ''shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States.'' That is it. That is all it says. Some have managed to find in those few words a requirement that the Senate give all judicial nominees up-or-down votes. Even if someone isn't a strict constructionist, I can't for the life of me understand where they get that from. Where is it? Where is it in the language? Where is it in the Constitution?

It may be the policy they prefer, but it is not a constitutional argument. It is not a constitutional requirement. In fact, the only language in the Constitution that directly addresses the issue we are faced with today is the following from Article I, clause 5:

Each House may determine the Rules of its Proceedings . . .

The Senate has determined its rules, and its rules also provide the means for changing the rules, of course. The Senate is now being asked to change the rules by breaking the rules. There is no principle involved here. There is just power.

It is a shame that those who support the President's nominees have inflated what is essentially a political dispute to a constitutional debate. For those of us who take the Constitution seriously, it is jarring to hear colleagues suggesting that one is violating one's oath of office by voting not to end debate on a nomination.

As my colleagues know, I spent 7 years in this body fighting to pass a campaign finance reform bill. We had a majority here on that bill after a couple of years. That wasn't the issue. For years that effort had the support of a bipartisan majority of Senators, but it was stymied by filibusters. Senators who supported reform had many spirited, sometimes even bitter, debates with Senators who opposed our bill. But never did we contend our opponents on campaign finance reform were violating their oath of office by using every tool available to oppose a bill with which they strongly disagreed.

The Constitution does not prohibit opponents of a judicial nominee—or any nominee, for that matter—from using a filibuster to block a final vote on the nominee. The majority does not have a constitutional right to confirm a nominee, and the nominee has no constitutional right to a vote. As the senior Senator from West Virginia said the other day: The Senate has often denied consent to a nominee in the past by simply refusing to schedule a final vote.

I have not always supported those actions, but I have not pretended they are unconstitutional.

If the arguments being advanced today by the Republican majority are correct, then the Republicans acted unconstitutionally in 1995 when they defeated the nomination of Henry Foster to be Surgeon General by using a filibuster. They violated the Constitution when they required cloture votes before ultimately confirming Stephen Breyer, Rosemary Burkett, H. Lee Sarokin, Richard Paez, and Marsha Berzon to circuit court judgeships, David Sacher to the Surgeon General's office, and Ricki Tigert to the FDIC, Walter Dellinger to the DOJ's Office of Legal Counsel, and the current Governor of Arizona, Janet Napolitano, to be U.S. Attorney. If the arguments being advanced today are correct, they violated their oaths of office when they forced the ambassadorial nomination of Sam Brown to be withdrawn because they refused to end debate on his nomination.

These are just the cases where a cloture vote was required to get a nomination through. I won't even start on the list of nominees who never even got a hearing or a vote in the Judiciary Committee or any kind of debate on the floor if they cleared committee. But there are dozens of them. Wasn't the majority denied its right to consent just as much in those cases? Is there any meaningful constitutional difference between a filibuster on the one hand and on the other hand a hold on the Senate floor or a wink and a nod between a committee chairman and a Member who just doesn't like a nominee? One could certainly argue the denial of consent by failing to schedule a hearing or a vote in committee is on even less firm constitutional ground than a filibuster because it allows just one Senator, the chairman of Judiciary Committee, to make the decision that the Senate's consent on a nominee will be withheld, whereas if all the Senators vote, a filibuster can be sustained only with 41 or more votes.

But there is no real argument that filibusters of judicial nominations are unconstitutional, just as blocking nominations in committee is not unconstitutional. There is no principle here that justifies eliminating the filibuster for judicial nominees who have lifetime appointments but leaves it intact for nominees to the executive branch who can only serve until the term of the appointing President ends at the latest.

There is no principle that can distinguish judicial nominations from legislation, which may also be passed by a majority, but can be amended or revoked by a majority in the same or later Congress as well. Again, the effort we are facing here is not based on principle, it is based on power. The lack of a constitutional basis for it is made even more clear by the specific plan that the majority leader spelled out in his press release last week.

He intends, according to that release, to ''seek a ruling from the Presiding Officer regarding the appropriate length of time for debate on such nominees.'' Seeking a ruling on how long we should debate? Surely the Presiding Officer cannot make that ruling on constitutional grounds, the idea of a constitutional time limit. What is the constitutional basis for ruling that the Senate can debate a nomination only for a particular length of time? Is the Presiding Officer going to opine that it is constitutional to debate a nomination for 100 hours, but unconstitutional for us to have 101 hours of debate? That would be absurd.

No, it appears that instead of following the existing precedents of the Senate, which state there is no dilatory rule except after cloture has been invoked, the Presiding Officer will just announce a new rule and the Senate will then debate and vote on an appeal of that ruling. If this happens, the rules of the Senate will be changed by fiat, by breaking the rules—not principle, power, the power of majority rule.

The Constitution did not set up the Senate to be a majoritarian body. That is why renaming the nuclear option as the constitutional option is so wrong. The Constitution allows citizens from smaller States who could be easily outvoted in a majoritarian legislature such as the House to have the same power in the Senate as citizens of larger States. This is not a minor provision, as the Presiding Officer knows. The Founders clearly didn't think so because—this is amazing—they made it the only provision in the Constitution that cannot be amended. No State can give up its equal representation in the Senate without its consent. You can't do a constitutional amendment to change that. They designed the Senate to be an important bulwark against majoritarian pressure.

The Senate rules from the very beginning, of course, have granted protections for the minority. There was no cloture rule at all until this century. The rule didn't cover nominations until 1949. While the cloture rule has changed over time—sometimes offering more protection to the minority and sometimes less—those rule changes have always been accomplished in accordance with the Senate rules until now, until the demand for power trumped principle.

The Framers intended the Senate to act as a check on the whims of the majority, not to facilitate them. I will not pretend the Senate has always been on the right side of history. At times, most notably during the great civil rights debates of the 1950s and 1960s, Senators used the powers given them to block vital, majority-supported legislation. But notwithstanding those dark moments, the Senate has also served throughout the history of this Republic as a place where individuals with different beliefs and goals were forced to come together to work for the common good.

By empowering the minority, the Framers created a body that has served this country well. To continue down the road we are on now will be to irretrievably change the very character of the Senate and irretrievably weaken the institution. Without the unique feature of extended debate, the Senate will be much less able to stand up to the President or to cool the passions of the explicitly majoritarian House.

I know my colleagues see themselves as guardians of this remarkable institution, as I do. When we leave the Senate—and some day, somehow or another, all of us will—it is our responsibility to ensure we do not leave this institution weakened. As Senators, we tend to see ourselves as pretty important, but none of us—and certainly no judicial nomination—is more important than the institution of the U.S. Senate itself.

Why is this extreme course necessary? Why are so many of our colleagues prepared to sacrifice the Senate's character and its special power? Why are they bent on giving up their own power as Senators?

Let me take a minute to respond to some of the charges made about the behavior of the minority that supposedly has given the majority no choice but to use this nuclear option. First, we are told using the filibuster to block a judicial nomination is unprecedented. As anyone who has studied the record knows, that is nonsense.

Most famously, the Fortas nomination was filibustered. The Senator who led that filibuster, Robert Griffin of Michigan, has tried to claim in recent days that it really wasn't a filibuster at all. But he said at the time:

> It is important to realize that it has not been unusual for the Senate to indicate its lack of approval for a nomination by just making sure that it never came to a vote on the merits. As I said, 21 nominations to the court have failed to win Senate approval. But only nine of that number were rejected on a direct, up-and-down vote.

We are told, however, that the Fortas nomination was different because there were Southern Democrats opposed to the nomination as well as Republicans. But what difference does that make? This debate is not about the rights of the minority party; it is about the rights of a minority of Senators. Does anyone really think that if one or a few of our Republican colleagues joined a filibuster against one of the handful of circuit court nominees that have been blocked, it would make a difference to the Senators who support the nominations and want to change the rules?

Fortas, of course, was a Supreme Court nominee, while the handful of nominees that have been blocked so far have been nominated to circuit courts. But there have been filibusters of circuit court nominees in the past as well, indeed in the very recent past. In 2000, cloture votes were held on two Clinton nominees to the Ninth Circuit, Marsha Berzo, and Richard Paez. The current majority leader himself voted against cloture on Judge Paez's nomination on March 8, 2000.

Apparently, these filibusters were different because they were unsuccessful. The handful of Democratic filibusters of President Bush's nominees are unprecedented, we are told, because the Republican filibusters of Richard Paez and Marsha Berzon didn't prevent them from being confirmed. Does anyone really think that if the current majority leader and the others who voted—against ending debate on the Paez nomination had convinced their colleagues to join them they would have then changed their votes the next time around to make sure that the principle of an up or down vote was maintained?

This is what now passes for debate and argument on the issue of so-called ''obstruction'' of President Bush's nominees. ''The filibusters are unprecedented,'' they say. Never mind that Republicans, including the majority leader, used the same tactic against nominees they opposed. ''Democratic obstruction of the President's nominations is unprecedented,'' we hear.

Never mind that the Senate approved 204 out of 214 nominations that came to the floor in President Bush's first term, but in the last 4 years of President Clinton's presidency, only 175 nominees were confirmed and 55 were blocked, including 20 circuit court nominees. Many of those nominees never even got a hearing in the Senate Judiciary Committee on which I sit.

Well, that was different, we are told, because President Bush's nominees have a majority of support in the Senate. But that distinction is nonsense as well. President Clinton's nominees had majority support, obviously. That is why they were held up in committee and never reached the floor, even for a cloture vote. Judge Paez, for example, was first nominated in January 1996. We finally confirmed him in March 2000. The vote on cloture was 85 to 14. The vote to confirm him was 59 to 39.

But one of the most foolish arguments we hear in support of the nuclear option is that there is a crisis in the courts because of the number of vacancies caused by Democratic filibusters. As of the end of President Bush's first term, during which the Senate confirmed 204 judges, there were only 27 vacancies on the Federal bench. The courts had their lowest vacancy rate since 1990. Five months into his second term, there are now 45 vacancies, but the President has made nominations for only 15 of them, one-third. For 30 vacancies there are no nominees. The vacancy rate is still very low historically. If there is a crisis now, which there isn't, it surely is not the Senate's fault.

There is no vacancy crisis. But we are about to be thrown into a constitutional crisis by a majority that is drunk with power. While there is plenty of blame to go around, the President precipitated this crisis. When he took office in 2001, he had an opportunity to end the bitterness that plagued judicial nominations over the previous decade by recognizing that an injustice had been done to a large number of Clinton nominees. Not an unconstitutional injustice, but an injustice nonetheless There were enough vacancies on the Federal appellate courts for him to name most of the judges but give a few seats to Clinton nominees who had been blocked, or to other nominees suggested by Democrats in those States. In his first group of nominations, which were almost all to the appellate courts, he made a nod in that direction by nominating Roger Gregory to the Fourth Circuit. President Clinton's nomination of Gregory, the first African-American to sit on that circuit, had been blocked in the Judiciary Committee. He was eventually confirmed by a 99–1 vote.

The hopes that the President would make good on his campaign promise to change the tone in Washington were short lived. He ignored pleas for consultation and conciliation on judicial nominations. Time after time, he has filled appellate court seats that had been kept vacant during the Clinton years with extremely conservative and often controversial nominees. Yet Democrats certainly didn't block all or even nearly a majority of those choices. Much to the displeasure of many of the groups on the left that work on nominations, Jeffrey Sutton and Deborah Cook now sit on the Sixth Circuit, Jay Bybee, who we later learned was the author of the infamous DOJ torture memo, is on the Ninth Circuit. Michael McConnell and Timothy Tymkovich are on the Tenth Circuit. In all, 35 of President Bush's nominations to the circuit courts have been confirmed, even though 9 of those seats became vacant during the Clinton years and were kept vacant by denying Clinton nominees an up or down vote.

Only seven judges were blocked because of their views or records. Three others were held up because of the particularly egregious tactics used to block Michigan nominees to the Sixth Circuit during the Clinton administration. The President has succeeded in reshaping the Federal courts to his liking. He may soon have one or even two Supreme Court nominations to make. He ought to be proud of and pleased with his accomplishments, but winning almost all the time apparently isn't enough. And in order to win every time, he is willing to push the Senate to upend over 200 years of tradition and precedent and perhaps permanently damage the comity on which this institution functions.

In the end, the seemingly insurmountable differences we have on judicial nominees can only be resolved the way that seemingly insurmountable differences are resolved on almost all other hotly contested issues in the Senate—through negotiation and compromise. Of course, for there to be compromise, both sides have to be willing to engage in that effort. The offers made by the majority leader thus far do not retain the unique and crucial feature of the current Senate rules—the right to unlimited debate. They amount to a slow motion nuclear option.

It may be that a confrontation cannot be avoided. The groups that support the President's nominees are clamoring for the nuclear trigger to be pulled. The only hope for the Senate is the Senate itself. In the end, this decision will be made by the 100 men and women given the honor and responsibility of serving in this body at this point in our Nation's history. The stakes could hardly be higher, or the consequences to this body more significant. I can only hope that my colleagues vote to let the Senate continue to be the Senate.

The checks and balances that the Framers created are at great risk today. The American people will suffer a great loss if we step over this precipice. My fervent plea and hope is that the Senate will choose principle over power.

I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from Louisiana is recognized.

Ms. LANDRIEU. Thank you, Mr. President. I understand we are in morning business. I ask unanimous consent that I may extend my remarks to consume about 20 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

ENERGY POLICY

Ms. LANDRIEU. Mr. President, this is shaping up to be an auspicious time for an Energy Bill, as we begin a year long celebration of Benjamin Franklin's 300th birthday. Benjamin Franklin was the embodiment of a ''renaissance man.'' He was a small business owner, a diplomat, an accomplished author, a scientist, and one of our Nation's greatest Founding Fathers. It is his role as a scientist that I want to focus on today and suggest that the best birthday present we could give him would be to honor his work and pass a balanced, forward-looking and scientifically-based Energy bill this year.

Americans learn from childhood the story of Franklin and his breakthrough experiment with a kite and lightening. In today's world, it is hard to imagine that a politician as accomplished as Benjamin Franklin would also make such a profound contribution to science. But, he did. Franklin's contribution to science was profound because his experiment with a kite and lightning proved that electricity was a naturally occurring phenomenon.

Before that, superstition governed man's interaction with electricity. It used to be that people believed the devil hurled electric bolts from the sky. So when a lightening storm was brewing, churches sent people to ring the bells to ward them off. Tragically, this same superstition seems to often guide our policies today.

Franklin's pioneering work with electricity is so instructive because it reminds us that we need to put reason and science before superstition and myth. Electricity was once a dangerous force in the world that, thanks to Franklin and Edison, we have now harnessed to provide power and light, life and hope, and the greatest prosperity the world has ever known. This remains our challenge today. If we want to continue to generate power for future generations, we must harness powerful forces—solar rays, geothermal steam, nuclear fusion, wave energy and new generations of fossil fuel technology.

To do so, we must abandon superstition, misinformation and fear.

The area of sharpest interest to the People of Louisiana in this bill, is also surely one of the areas most in need of reason over superstition—oil and gas production, both on shore and on the Outer Continental Shelf. As we are all aware, the United States has an abundant demand for fossil fuels, but also a great need to use them wisely.